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TRADE MEASURES AS A TOOL TO INFLUENCE ENVIRONMENTAL POLICY ABROAD: THE UNINTENDED CONSEQUENCES OF U.S. UNILATERALISM

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Global awareness of the severity of natural resource mismanagement and environmental destruction worldwide has increased markedly in recent years. In the United States, this trend has resulted in heightened popular pressure on government officials to use all available tools—including unilateral trade measures—to influence foreign governments' environmental policies. This paper illustrates current efforts, both unilateral and multilateral, by the U.S. government to affect via trade policy environmental regulation or resource management abroad. It suggests that while unilateral trade measures are easy to administer and can be very effective in shaping

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environmental policy abroad, they can also be detrimental to U.S. interests in a liberalized world trading system and comprehensive international agreements to deal with global environmental problems. The paper concludes that use of U.S. unilateral trade barriers should be restricted to cases where such action punishes behavior that blatantly and dangerously disrespects a widely accepted international norm. Otherwise, less intrusive alternative policy responses should be preferred.

Introduction

Awareness of issues concerning the global environment has risen quickly in recent years in many parts of the world. As greater understanding of the magnitude of global environmental problems and the need for collective action has emerged, representatives in Congress have begun to look at the environmental policies of other countries and how the United States government might take unilateral action to prod other governments into emulating the U.S. model. In many cases, legislators have found unilateral trade measures, especially import restrictions, to be one of the most practical and influential instruments in pressuring foreign governments to follow our lead in combating such problems. By making trade with the United States contingent on adopting our environmental standards, we can have an impact, especially on developing countries that rely on trade with the industrialized world and have no capacity for retaliation.

While the environmental movement has gained a great deal of momentum in the North, less developed countries in the South have other, more compelling priorities. During the 1980s, massive external debt burdens and deeply entrenched political and economic instability resulted in stagnated development for many developing countries, leaving them justifiably preoccupied with how to allocate scarce financial and technical resources to meet basic needs. The environmental problems with which they are most concerned therefore relate to survival: basic sanitation, contaminated and insufficient water, soil erosion, and other immediate crises. They do not have the luxury of concentrating their attention and resources on international environmental problems that may impact, however severely, future generations.[1] It should be noted, however, that differences in environmental priorities are driven not only by differences in wealth. The spread of public awareness and education about the environment, and the receptivity of the government to this public concern can also play a significant role in shaping environmental policy.[2]

While unilateral U.S. trade measures have been levied indiscriminately against countries of widely varying size, wealth, and power, the impact may be most pronounced in less developed countries (LDCs), especially those that rely heavily on trade with the United States. (Financial Times,

1992b). Consideration of the unintended consequences—economic, political, and legal—of using trade measures to force other countries to mirror our environmental preferences demonstrates the need for some restraint. Though utilizing trade policy to extract environmental policy changes in other countries does respond to the heightened demands of many in the environmental community,[3] it can only be justified as in our best interest under certain narrowly defined circumstances and subject to strict limits. This paper will first discuss the current actions the United States is taking, both unilaterally and multilaterally, in this area. Then it will analyze the advantages and disadvantages of designing unilateral trade measures specifically to influence foreign countries' environmental policies. Finally, it will explore the conditions under which such action is justifiable.

Unilateral Initiatives by the U.S. Congress

As indicated, a powerful movement to dictate appropriate environmental standards to other countries has gained an impressive following in the U.S. Congress.[4] In many cases, collective action through multilateral negotiation and positive incentives has been supplanted by the more immediate and powerful threat of trade barriers for those who do not cooperate. There are two rationales for unilateral efforts to alter the environmental performance or standards of foreign nations. First, the U.S. government, for either competitiveness or paternal reasons, might attempt to sway other countries' purely domestic environmental policies. Second, it might attempt to penalize another country for environmental degradation or unsustainable resource depletion of the "global commons".

In cases that fall under the first category, Congress has expressed dissatisfaction with another sovereign nation's choice of how best to respond to local environmental problems, the effects of which are clearly confined to national borders, and sought to impose U.S. preferences. Such dissatisfaction may have arisen from concerns of environmental groups or complaints of U.S. industries facing stringent domestic regulation. Although these two political lobbies pursue very different goals, when trade measures are used to back the sovereign imposition of environmental preferences they can both be satisfied with the enactment of a single piece of legislation.

For example, in 1991 Senator David L. Boren (D-OK) introduced the International Pollution Deterrence Act[5] which calls for countervailing duties to be levied against countries whose industries are not forced to invest an equal amount of money in pollution prevention and environmental cleanup. The bill addresses a concern of U.S. businesses that they are disadvantaged by these costs in competing with foreign firms; proponents of the bill argue that the countervailing duties simply encourage more stringent and more appropriate environmental regulation abroad.

Leaving aside the very practical problems of how to actually implement such legislation (whose arbitrary determination of foreign costs stands, and what happens if we find that certain industries in other countries are actually investing more in compliance costs), the bill is fraught with more fundamental problems. First, it is not realistic to expect all countries to have identical standards. Second, determination of U.S. competitive disadvantage on the basis of money invested rather than environmental outcomes discourages efficient, least-cost pollution reduction. Third, such subjective and far-reaching legislation invites retaliation from those countries that receive unfavorable "scores" or those that have problems with U.S. policies in other areas (say less burdensome labor laws, e.g.) that work to the advantage of U.S. companies. In any event, such legislation can unite environmental advocacy groups and the protectionist lobby resulting in a powerful political coalition.

Unilateral action may also be taken to influence environmental policy affecting common resources, such as fishing stocks or marine mammal populations. Examples of such action are found in the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) which call for import barriers on certain categories of goods to discourage environmentally offensive action such as the killing of an endangered species. Often, the imported products that are targeted are only linked to the behavior which the U.S. government seeks to alter. In other words, the imported products themselves are not endangered species, but they are caught or produced in a manner or via a process which is deemed environmentally offensive. The 1989 Amendments to the ESA, for example, include a provision that restricts the importation of shrimp in order to protect sea turtles whose lives and marine environment have been threatened by the intensive use of shrimp trawlers in commercial shrimp fishing operations (16 U.S.C. Secs. 1531-1544 1988).[6] Such restrictions already exist for U.S. businesses who have found it difficult to compete against countries who do not face these restrictions. The trade measures are to some extent included to placate the domestic shrimp harvesting industry, which has complained bitterly about the extent of U.S. regulation in comparison to that facing foreign competitors. (McDorman 1991, 496).

The MMPA also is designed to reduce the incidental taking of marine mammals in the course of commercial fishing. The Act imposes the most rigorous requirements on foreign nations harvesting yellowfin tuna in the eastern tropical Pacific Ocean (ETPO), an area where dolphin populations are particularly vulnerable.[7] The law directs U.S. fishermen to use "the best marine mammal safety techniques and equipment that are economically and technologically practicable" and bans imports of commercial fish or fish products that are caught with technology "which results in the incidental kill or incidental serious injury of ocean mammals in excess of

United States standards." Specifically, foreign companies are bound by the "average rate of the incidental taking by vessels of the harvesting nation [of] no more than 1.25 times that of U.S. vessels during the same period." As with the 1989 Amendments to the ESA, U.S. business interests are well represented in the trade provisions of the MMPA.[8]

The amendments to the MMPA also ban imports of fish and fish products if it cannot be demonstrated that these products were not harvested with large-scale driftnets. Specifically, imports are banned from countries whose fishing boats practice high seas driftnet fishing unless the exporting nation can "provide documentary evidence that the fish or fish product was not harvested with a large-scale driftnet in the South Pacific Ocean after July 1, 1991, or in any other water of the high seas after July 1, 1992." (16 U.S.C.A. Sec. 1371.a.2.E 1991). The amendments call for faster action with respect to tuna and tuna products, requiring proof that such products were not harvested with a large-scale driftnet anywhere on the high seas after July 1, 1991.

Multilateral Initiatives Implemented by the U.S. Congress

Multilateral initiatives to address international environmental problems generally rely on both positive and negative incentives to encourage participation and the good will of participants to enforce it. An effective course of action to address environmental problems requires a critical mass[9] of the countries that contribute to or are affected by the problem. To secure such participation, a reservation clause may be included which allows a country to exempt itself from the need to comply with any particular provision of or amendment to the agreement. Yet this flexibility can make certain provisions of the treaty ineffective. If a significant number of participating countries (which can be as few as one or two key signatories) opt out of important components of the agreement, then the fundamental objectives may not be met.

The Pelly and Packwood-Magnuson Amendments

To discourage countries from exempting themselves from the terms of international fisheries and wildlife agreements, the Pelly Amendment of the Fisherman's Protective Act of 1967 (22 U.S.C. Sec. 1978 1988) and the Packwood-Magnuson Amendments to the Fisheries Conservation and Management Act were introduced (16 U.S.C. Sec. 182.1e2 1988). The Pelly Amendment attempts to dissuade foreign countries from both "conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program" and "engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species." (22 U.S.C.

Sec. 1978 a1-2 1988). If a country is deemed in violation of either of these provisions, a process of "certification" begins whereby the President is notified of the findings and may then "prohibit the bringing or the importation into the United States of fish . . . or wildlife products" for an appropriate duration and to the extent that such a prohibition is GATT-consistent (22 U.S.C. Sec. 1978 a4 1988).

The Pelly Amendment originated in the 1969-1971 period with concern over the depletion of the Atlantic salmon stock which was gravely threatened by intense harvesting. Its sponsor, Representative Thomas M. Pelly, argued that in order to enforce a ban on salmon fishing, as proposed by the International Commission for the Northwest Atlantic Fisheries (ICNAF), the U.S. government should use trade measures to deter non-cooperative countries from undercutting conservation goals. The nations which the Pelly Amendment targeted (Denmark, Norway, and West Germany) had exercised their right under the convention to object to particular measures taken by ICNAF and were, therefore, not bound by international law (McDorman 1991, 482). So although the Pelly Amendment, as written, should be considered an effort to strengthen those environmental agreements to which the United States is a party, it attempts to extend liability under such agreements to countries that have no binding commitment under international law.[10] The role of the U.S. fishing industry, disadvantaged—at least in the short run—by the ban on salmon fishing, in applying political pressure in favor of an aggressive trade policy should not be overlooked.

The Packwood-Magnuson Amendments were designed specifically to lend enforcement power to the International Convention for the Regulation of Whaling (ICRW, 1946), though, as with the Pelly Amendment, countries subject to sanctions pursuant to these amendments may not be in violation of their obligations under international law. The International Whaling Convention reflected international recognition of the need for some protection of whale stocks (61 Stat.1716, T.I.A.S. No. 1849, 161 U.N.T.S.72). Over the decades, the United States pressed for more effective and comprehensive conservation efforts and by the early 1980s, an international consensus had emerged in favor of a moratorium on commercial whaling (D'Amato and Chopra 1991). This moratorium was resisted by several LDCs, as well as a few other countries whose cooperation was critical to the effectiveness of the Convention. The governments of Japan, Iceland, Norway, and the USSR, for example, consistently filed objections to more stringent catch restrictions despite international pressure. Several countries, Japan in particular, have recently preferred not to object but rather to take advantage of a loophole in the moratorium to catch unreasonably large numbers of whales under the guise of "scientific research."[11]

Two key provisions of the Packwood-Magnuson Amendments pro-

vide the United States with an enforcement mechanism for the Convention. First, the offending country is certified under the Pelly Amendment if foreign nationals are "conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling." (16 U.S.C. Sec. 1821e2 1988). Second, if a foreign country is certified under these amendments, then that country's allocation of fishing rights for fisheries managed by the United States must be reduced by no less than 50 percent (16 U.S.C. Sec. 1821 e2 1988). Again, an aggressive U.S. Congress sought to prevent any country from free-riding on the conservation efforts of the committed signatories. Significantly, unlike the terms of other international agreements,[12] the International Whaling Convention does not include any trade provisions. Further supporting the right of participants to escape specific obligations when deemed undesirable and casting some doubt on the acceptability of U.S. enforcement via trade measures, the Convention does not even contain a general provision permitting parties to take certain measures necessary to accomplish the goals of the agreement.[13] Nevertheless, the International Whaling Convention has gained the backing of a huge majority of interested and affected countries worldwide and U.S. trade measures to encourage universal compliance with all of its terms may amount to enforcement of a widely accepted international norm.[14]

The Convention on International Trade in Endangered Species

The Convention on International Trade in Endangered Species of Wild Fauna and Flora[15] (CITES) was signed in 1973 for the purpose of protecting endangered species against the over-exploitation which unrestricted international trade may encourage. Unlike agreements such as the ICRW or the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (both of which promote the environmental goal of conservation or sound management of marine resources), CITES is concerned primarily and directly with the trade of endangered species. While congressional legislation like the Pelly and Packwood-Magnuson Amendments utilize trade provisions in an effort to limit excessive harvesting of marine life or whales, trade itself is considered the root of the depletion problem in CITES. By restricting trade, CITES presumably restricts the profit-making activity that drives the over-exploitation of endangered or threatened species.

CITES includes three appendices (the contents of which can change depending on the condition of particular species) which list species threatened with extinction (Appendix I), species potentially endangered without strict regulation of trade (Appendix II), and species that are regulated in a participating country's jurisdiction and which require international cooperation to control trade (Appendix III).[16] As was the case

with the ICRW, CITES provides an optional commitment clause which enables parties to exempt themselves from the convention's requirements with respect to particular species listed in any of the three appendices (GATT 1992, 37).

As of July 1991, 110 countries had signed CITES, demonstrating a remarkably broad international consensus (The Journal of Commerce 1991a). The United States again was a catalyst in spurring international agreement. The Convention regulates trade only in the species listed in the appendices, not in related products.[17] While some sea turtles protected in the 1989 Amendments to the ESA and the dolphin species singled out in the MMPA are included in the CITES appendices,[18] the Convention does not empower any one participating country to place import restrictions on shrimp or tuna harvested in a manner detrimental to sea turtles or dolphins. Yet where production or harvesting of an imported product compromises the survival or welfare of endangered or threatened species, the U.S. government is likely to restrict trade in the related product. The Pelly Amendment provides for U.S. trade sanctions to police violators of the agreement even though no such enforcement provisions are specified in CITES itself.

Advantages and Disadvantages of Unilateral Trade Measures

The advantages of unilateral trade action to pressure foreign governments into mirroring U.S. environmental standards or to compel participation in international agreements are becoming more apparent to members of Congress. The primary advantage of unilateral action lies in its effectiveness due to the economic and political leverage the United States enjoys. The imposition by the United States of an import barrier and the subsequent reduction in demand can have a marked impact on world price and the economic well-being of foreign producers of the restricted good.[19] While the relative effectiveness of import barriers will depend on the magnitude of the targeted country's trade with the United States and the existence of alternative sources of demand for the banned product,[20] the majority of the countries which we target for import prohibitions to coerce certain behavior will accede to U.S. demands, albeit often begrudgingly.

There are numerous examples of policy changes which have resulted from U.S. unilateral pressure, especially the threat of trade sanctions under the Pelly and Packwood-Magnuson Amendments.[21] The following examples are illustrative:

• In 1978, Chile, Peru, and South Korea, none of whom were parties to the ICRW, joined or took steps to join the Convention in response to the threat of U.S. trade barriers under the Pelly Amendment for unsustainable whaling activities that undermined the agreement's effectiveness (Martin

and Brennan 1989, 299). Similarly, Taiwan, also a non-signatory, ultimately banned whaling at least partly in response to U.S. pressure (Martin and Brennan 1989, 299-300).

- In 1984, the threat of sanctions under the Pelly and Packwood-Magnuson Amendments exacted concessions from Japan to adhere to negotiated quotas and ultimately to ban commercial whaling by 1988 in return for immunity from certification under either amendment.[22]
- In 1986, shortly after certification under the Pelly Amendment for exceeding whaling quotas, Norway announced its intention to suspend commercial whaling after the 1987 season (though it refused to withdraw its objection to the moratorium). The President deemed this a sufficient response and withdrew the threat of sanctions.[23]
- In 1991, the Japanese government agreed to prohibit the importation of hawksbill-turtle shells[24] by January 1993 in response to the threat of trade sanctions from the U.S. government that would have affected over $300 million worth of fish and other exports (Blackhurst and Subramanian, 266).
- The threat of a U.S. boycott on imports of tuna harvested in a manner inconsistent with the MMPA has apparently encouraged a number of countries, including the Congo, New Zealand, Senegal, and Spain, to adopt U.S. procedures for releasing dolphins trapped in fishnets.[25]

These examples demonstrate that the threat of trade sanctions can be a strategically influential tool for the United States, allowing it to exert political and economic pressure abroad on a scale that is probably unmatched by even Japan or Europe. The United States government has powerful means at its disposal to spur other countries into designing government policies to support U.S. initiatives and into changing their priorities to more closely match ours.[26]

Not only are unilateral trade measures a powerful tool in extracting behavioral changes from foreign states, but they can also play a critical role in pushing countries that are affected by or involved in a regional or international environmental problem to the bargaining table. There is substantial evidence to suggest that when the United States chooses to address an environmental concern, often international negotiations ensue between interested parties that can lead to some form of multilateral agreement. International negotiations on oil tanker standards were at least in part a result of U.S. legislation to regulate the passage of foreign ships in U.S. waters. In 1972, in order to minimize the risk to the environment of oil spills, Congress mandated that the United States impose tanker design and construction standards upon foreign vessels by 1976, unless the desired standards were adopted sooner by international agreement.[27] The U.S. threat to unilaterally impose standards more stringent than those observed elsewhere forced foreign vessels desiring to transport cargo through U.S.

waters to take heed and ultimately contributed to the 1978 Amendments to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL).

U.S. pressure also led to a United Nations-backed unconditional ban on driftnet fishing which required all countries involved (i.e., Japan, South Korea, and Taiwan) to reduce their high seas driftnet fishing by 50 percent as of June 30, 1992, and to prohibit it by the end of 1992 (The Economist 1991b). The latest U.N. resolution extends the limited scope of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific to cover all oceans. Unilateral U.S. initiatives such as the Driftnet Impact Monitoring, Assessment and Control Act of 1987 went a long way toward garnering the kind of international consensus needed to render this practice obsolete.

It should be noted, however, that unilateral action is not always so effective. In response to the failure of the Mexican fishing industry to comply with limits on the incidental taking of certain dolphin species in the ETPO as stated in the MMPA, the U.S. government prohibited imports of Mexican tuna products. Then, in 1991, Mexico filed a claim with the GATT (General Agreement on Tariffs and Trade) against these sanctions. Ultimately, the GATT found unanimously in favor of the Mexican government and directed the U.S. government to make the inconsistent portions of the MMPA conform to GATT rules (Christensen and Geffin 1991-2). The U.S. government responded by reaching a bilateral agreement with Mexico to phase-out the practice of purse seine net fishing by year-end 1994 in the relevant regions. The MMPA's provisions concerning dolphin conservation, though not necessarily permissible under international law, did raise the level of awareness of the indiscriminate killing of dolphins by confronting all concerned nations and may have expedited international negotiations. Yet, in this case, it was the United States that was forced to negotiate an agreement and consequently lift the boycott on Mexico's tuna products in order to avoid retaliatory trade measures.

Another critical advantage of unilateral action is the relative ease with which it may be initiated and administered. Negotiations among many countries, each with its own set of demands and preferences, can be long and cumbersome.[28] Even when multilateral agreements are in place, the U.S. government has used unilateral enforcement to strengthen the agreements' effectiveness when parties exempt themselves (e.g., the ICRW, CITES). The delay which is avoided by replacing multilateral negotiations with unilateral sanctions is significant and may be critical when the magnitude and urgency of a problem demand it.

The disadvantages of U.S. unilateralism have already been implied. While sanctions enable the U.S to shape global environmental policy and set priorities, reliance on our own political and economic clout indepen-

dent of input from abroad weakens, or at least de-emphasizes, multilateral channels for cooperation.[29] Such unilateral action signals U.S. resistance to a process of international negotiation and compromise and produces a lack of international trust which can make coordination very difficult. This effect is particularly evident in relations between the United States and the LDCs. It is one thing for the United States to threaten the Japanese government with trade restrictions when both countries have substantial leverage internationally. However, unilateral measures directed at Mexico, Venezuela, Brazil, Thailand, Indonesia, Malaysia, and even poorer countries in the South can have a devastating impact. Insensitivity to the plight of many developing countries whose involvement is needed to combat environmental problems can poison the atmosphere around the bargaining table. For example, in negotiations leading up to the Earth Summit, the United States was viewed more as a bully than as a beacon of compromise and conciliation. The United States was and is considered a very reluctant partner, unwilling to compromise or participate in multilateral initiatives when it cannot set the terms.[30]

Additionally, unilateral U.S. pressure designed to bring foreign nations to the bargaining table does not often result in the most effective, comprehensive and cooperative international agreements. For example, U.S.-Mexican bilateral negotiations on the use of purse-seine nets, undertaken primarily to head off trade retaliation under the GATT, resulted in a hastily-negotiated end-product. Other affected countries did not participate in the discussions and there was little emphasis on the need for information exchange and ongoing scientific assessment of the extent of the problem to guide the terms of the agreement. Furthermore, politically-driven bilateral negotiations provide little opportunity for financial incentives or technology exchange. This is especially true with respect to alternative fishing techniques and the economic well-being of the affected foreign nationals. The point is that international environmental agreements that arise from or are expedited by U.S. unilateralism can easily fall short of the kinds of sound, comprehensive measures that might be taken in a more cooperative, multilateral setting.

Unilateral U.S. trade sanctions may also be in violation of the GATT. The GATT and its promotion of free trade worldwide have benefited the United States and other countries by allowing for economies of scale and encouraging specialization. While the contribution of free trade to global welfare has been large, these benefits are spread over vast numbers of consumers and therefore few Americans recognize the gains in reduced protectionism that the GATT process has fostered. As a recent GATT report noted, "[t]o someone unfamiliar with, or indifferent to, the contribution of economic efficiency and the trading system to postwar economic prosperity, trade measures can too easily seem to be low cost and readily available

tools for pursuing environmental goals." (GATT 1992,5) The GATT decision in the U.S.-Mexican tuna dolphin case has brought into question a range of U.S. domestic environmental measures that hinder free trade. While the issue of whether or not legislation such as the MMPA, which subjects foreign governments and their citizens to U.S. law, is compatible with or even should take priority over the General Agreement is the topic for another paper, the fact is that GATT parties unanimously condemned U.S. trade measures taken under the provisions of the MMPA. The MMPA's third-country provisions in particular created quite a stir among European countries trading with Mexico and Venezuela.[31] In fact, the EC was directly affected by a January 1992 U.S. court ruling that, as required in the MMPA, extended the import prohibition to about 20 additional countries, including France, Italy, and Spain.

Justifiably, European countries, as well as the developing world, fear the potentially disruptive and inflammatory consequences of an international trading system where each country, unique in its own preferences and perceptions of risk, restricts trade with others whose regulatory standards are deemed inadequate. The latest GATT statement on this issue includes the following:

> [T]o allow each contracting party unilaterally to impose special duties against whatever it objects to among the domestic policies of other contracting parties would risk an eventual descent into chaotic trade conditions similar to those that plagued the 1930's. Regardless of the nature of an environmental problem, the contribution of multilateral cooperation is to reduce the possibility that solutions are affected by differences in the economic and political strengths of the parties involved.... [I]t is important to minimize the risk of solutions being imposed by the larger or richer countries (GATT 1992, 1-9).

If the United States government continues to insist on employing far-reaching and intrusive domestic regulations that tear at the fabric of the world trading system, it may not just face retaliatory action from other GATT parties, but may also set a dangerous precedent to be followed around the globe. If the great majority of the world's countries do not possess "economic and political strength" rivaling that of the United States, many may still follow our lead in applying potentially self-serving domestic laws extraterritorially.[32]

Limitations on Unilateralism

In light of the advantages and disadvantages of unilateral trade measures, it is challenging to demarcate boundaries within which U.S. international environmental policy should operate. The next and final section considers the most effective means for the United States to combat ecological problems in the global commons.

The preferred manner of approaching international environmental

problems is through an open and anticipatory negotiating process in which all affected countries have a stake in the drafting and implementation processes. Ideally, consensus can be forged well in advance of severe ecological crises. Any multilateral agreement that requires global participation must respond to the needs of the developing world. However, the expediency and general effectiveness of unilateral trade sanctions often cause this tool to prevail over the more comprehensive approach.

When faced with a pressing global environmental problem, U.S. policy makers often expect the relevant countries to take immediate steps domestically to address the problem. Yet, such an outlook is blind to the fact that these steps are especially costly for LDCs given the state of development in these countries, and penalize the poorer countries who rarely have contributed substantially to the problem. In situations such as these, a multilateral context is superior to a unilateral one. Negative incentives in the form of threatened trade measures preclude a cooperative process where equity concerns can be addressed.

On the other hand, comprehensive multilateral agreements often include the extension of financial resources to reduce the hardships LDCs face in addressing the problem.[33] Multilateral fora also build up trust and allow for greater coordination between regions and countries with respect to available technologies and regulatory/managerial know-how. As mentioned earlier, multilateral solutions can be very difficult to achieve because of such factors as diplomatic considerations, large numbers of interested parties, differing economic objectives, and lengthy delays inherent in the negotiating process. I do not deny these barriers, but argue only that they can be reduced if, in stark contrast to the current trend, U.S. policy consistently emphasizes cooperative and comprehensive international agreements.

The use of unilateral measures might also reduce the effectiveness of the United States as the leader in shaping international policy by reducing its credibility. By dismissing the multilateral approach, the U.S. government often appears insincere in its actions. Many countries wonder if the U.S. government policy is interested in sensible, cooperative, and comprehensive measures to redress environmental degradation and resource depletion in the global commons, or if it only responds to solutions that clearly favor U.S. interests.

While a multilateral process is generally preferred to a more unilateral one, the appropriate tool depends on the urgency of the problem and the effect that the tool is likely to have. For example, Congressional efforts to grapple with damaging fishing techniques on the high seas illustrate two very different situations, one in which unilateral action was justified but a primarily multilateral approach was used, and one where unilateral action was not justified but was used. Unilateral measures to ban the use of driftnets, known as "walls of death," responded to a definite environmen-

tal crisis. In this case, immediate and extraordinary efforts were certainly justifiable. Even so, the United States government did not attempt to resolve this problem singlehandedly. In fact, the Driftnet Impact Monitoring, Assessment & Control Act of 1987 required "international negotiations aimed at assessing [the] impact of driftnetting on marine mammals, demonstrating a congressional desire to promote the dissemination of information, which can be critically important in persuading foreign nations that it is in their best interest to cooperate in combating mutually damaging global environmental problems." (Driesen 1991, 307-08, n. 132). The United States also spearheaded multilateral efforts in the UN General Assembly to push up the timetable for a total ban on this devastating practice (The Journal of Commerce 1991a). Japan, Korea, and Taiwan were the only countries resisting such a ban in the face of broad-based opposition and convincing scientific evidence. Based on the widespread consensus over and urgency of the problem, the U.S. threatened trade sanctions, and the three Asian countries subsequently agreed to phase out the use of these nets. In this case, where the environmental threat was immediate and the process primarily multilateral, the use of trade sanctions to extract a change in behavior should not be condemned. Additionally, it should be noted that in this case, poorer fishing nations had foregone the economic benefits of driftnet fishing while prosperous Taiwan, Korea, and Japan continued to permit it (The Economist 1991b). So the issue was very much a North-North one and the unilateral action should not be seen as insensitive to the plight of developing countries.

In a second case, the U.S. took unilateral action to address an environmental problem that was not immediate, and the resulting trade sanctions may be seen as insensitive to the condition of LDCs. To reduce the use of purse seine nets that indiscriminately kill dolphins, the U.S. government opted to enforce taking standards unilaterally via the MMPA rather than pursue more aggressively a cooperative regional solution to the problem under the auspices of the already established IATTC, whose members included all affected parties. As mentioned above, the MMPA's provisions trigger trade sanctions against any country not in compliance with U.S. standards for incidental taking. One would think that a comprehensive and scientifically sound management plan to conserve the region's threatened dolphins would set specific maximum quotas for incidental taking, distributed equitably amongst those parties involved, that in the aggregate would maintain sustainable populations of the protected species. The MMPA sets arbitrary and uncertain limits on foreign "producers" that have little basis in science.[34] It defines a "bouncing-ball" standard by which foreign countries are obligated to limit the incidental taking of dolphins in the ETPO to 1.25 times whatever the U.S. fishing industry takes in a given year. This number could vary widely from year to year with shifts in the

location of U.S. vessels and fishing techniques. Furthermore, the chosen standard does not measure a country's behavior, at least not in any way directly, in terms of how damaging it is to dolphins, but rather compares it to the performance of the U.S. industry.[35] Additionally, the Act conveniently fails to consider the economic and technical disadvantages facing targeted nations. The MMPA's provisions that raise import barriers against our poorer neighbors to the south represent some of the main failures and inadequacies of U.S. unilateralism.

The employment of unilateral trade measures to maintain the effectiveness of widely supported international agreements that have the potential to be undermined by free riders may also be justified (Christensen and Geffin 1991-2, 594 n.107). Even if an agreement, such as CITES or the ICRW, permits parties to opt out of certain commitments, a strong case can be made for punishing free riders when the great majority of affected parties abide by all important provisions. In such circumstances, especially when the free rider(s) exacerbates a potentially grave and scientifically recognized international environmental problem, the actions of the majority can be construed as laying the groundwork for an implicit international norm that can become binding under international law. A certain standard or norm of behavior over which there exists a nearly unanimous degree of consensus can come to be recognized under customary international law when a large majority of the world's countries implicitly or explicitly follow or abide by it.[36] Under this view, some applications of U.S. trade policy (including the threat of sanctions) under the Pelly Amendment that seek to strengthen CITES and international fishery agreements may be justifiable.

From an economic perspective, the optimal approach to dealing with international environmental problems is to set policies that target the problem directly; trade policy is not the "first-best" approach. However, trade measures may be the only available tool for policy makers, particularly in circumstances where cooperative negotiation (the first-best approach) is highly unlikely.[37] Nevertheless, there are important economic tools (short of import prohibitions that are necessarily controversial in the world trading system) that can be used by governments in conjunction with political pressure to bring foreign countries to the bargaining table. These include import taxes on targeted products and labeling requirements that notify and educate consumers of the problem to make such products less attractive in the U.S. marketplace (GATT 1992,11,25). Such strategies exert pressure on foreign governments without the alternative intrusive bans.

Conclusion

While the threat of trade sanctions to encourage compliance can be justified with international governments under certain circumstances,[38] positive incentives such as increased aid or reduced trade barriers are capable of exerting an equal amount of influence without impeding international trade flows.[39] Ultimately, the acceptability of U.S. efforts that incorporate trade sanctions to influence other countries hinges on the necessity of our actions or support for our cause as evidenced by internationally recognized and mutually agreed upon consensus or, alternatively, on an unacceptable degree of risk that an environmental catastrophe could occur. These are the key criteria in assessing whether or not U.S. unilateralism in this area is justifiable. One must evaluate the nature of the environmental threat to which a country responds on its own. As recognized by Bilder, some unilateral steps are more likely to be justified (when there are effective barriers to a collective response) as "responses to imminent, highly probable, and fairly grave environmental dangers," while others, as "responses to what many might regard as a less imminent, more contingent, and less serious type of environmental threat" are much less valid. (Bilder 1981, 72).

Notes

[1] The Hague Report refers to "an unequal world of the poor and the rich" and emphasizes that there cannot be "shared responsibility . . . for the health of the global commons without some measure of shared global prosperity. Global sustainability without global justice will always remain an elusive goal." (The Hague Report 1992,3).

[2] See generally, GATT 1992, 19, n.20. For example, Japan, though exceedingly wealthy, has showed less concern for the environment than other comparably endowed OECD countries, in part due to lower environmental awareness. This is changing rapidly as indigenous and international environmental groups work to increase awareness. Eastern Europe also provides an illustration of the complex relationship between economic growth and environmental regulation. Despite a fairly advanced state of economic development in Poland, Czechoslovakia, and the former East Germany, the centralized regimes governing these countries were not directly responsive to public opinion or pressure in favor of at least minimal controls on severely polluting industries.

[3] One should note that it can also play to the protectionist sentiments of domestic industries. The task of distinguishing between trade barriers erected primarily for environmental goals and those that hide disguised protectionist motives can become very difficult.

[4] See, e.g., speech by Senator Max Baucus (D-MT) addressing disparity in environmental policy between countries, (*BNA International Trade Reporter* 1991, 1).

[5] S. 984. This bill has not yet been enacted into law, but it has generated substantial support in both houses. See (*BNA Trade Reporter* 1991,1)

[6] Apparently, damage to sea turtles is minimized by turtle excluder devices (TEDs) which may simultaneously reduce the size of shrimp harvests. (McDorman 1991).

[7] A particular association between dolphins and tuna has long been observed in the ETPO, but not in other areas. Therefore, according to the GATT panel hearing the tuna-dolphin case, "intentional encirclement of dolphins with purse-seine nets is used as a tuna fishing technique only in the [ETPO]" United States —Restrictions on Imports of Tuna, GATT Doc. DS21/R (Sept. 3, 1991) at 2. The notion that this phenomenon only occurs in the ETPO is the subject of some dispute. (McDorman 1991, 36-7).

[8] For persuasive evidence of a protectionist element in these provisions of the MMPA. See GATT 1991a, 25-6; *The Economist* 1991a. But see Christensen and Geffin 1991-2 for argument that the U.S. fishing interests bitterly opposed the MMPA on the basis that it put American industry at an unfair disadvantage.

[9] In this setting, "critical mass" refers loosely to the involvement/ participation of enough countries to make the beneficial impact of their collective efforts significant in attacking the environmental problem at hand.

[10] At least no explicit commitment under international law —leaving the possibility of the creation of a binding norm under customary international law aside until later.

[11] For example, Iceland's 1987 research program involved the hunting and killing of 80 fin and 20 sei whales (unrealistically high numbers) and Japan's purported scientific research program for the same year proposed 825 mink whale and 50 sperm whale deaths. (D'Amato and Chopra 1991, 48). D'Amato and Chopra describe Japan's "very shady" scientific program as a "cloaked commercial activity." (D'Amato and Chopra 1991, 55; de la Mare 1990, 771).

[12] Such as the Convention on International Trade in Endangered Species, the Montreal Protocol, and the Basel Convention.

[13] McDorman 1991, 509.

[14] See *infra* note 36 and accompanying text for discussion of the development of international norms that can become binding under international law.

[15] Mar. 6, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243 (hereinafter CITES).

[16] On the specific restrictions that govern trade in species according to their classification. See GATT 1991b, 27-30.

[17] "CITES does not permit a state to impose an import prohibition on non-endangered species even if such a measure is perceived as necessary to protect endangered species." (McDorman 1991, 509).

[18] The targeted dolphin species in the ETPO are the common dolphin *(Delphinus delphus)*, the spotted dolphin *(Stenella attenueta)*, and the spinner dolphin *(Stenella longirostris)*, all of which are listed in Appendix II (of the three, the latter two are more threatened). (Christensen and Geffin, 1991-2, 595n118). Protection of turtles under the ESA Amendments is directed, at least in part, at the olive ridley *(Lepidochelys kempi)* and hawksbill *(Eretmochelys imbricata)* sea turtles, both of which are endangered species. (Charnovitz, 1991).

[19] Conversely it can have a very positive impact on domestic producers/suppliers of the trade-restricted good who will be called upon to meet demand in excess of domestic (plus some reduced level of foreign) supply.

[20] Producers may be able to replace lost U.S. demand with increased demand by other foreign importers. In some cases, this process of shifting exports can be extremely costly for the foreign country and particularly damaging to the foreign industry involved. Provisions of the MMPA that restrict trade with "intermediary nations" (i.e. those that continue to trade in the restricted product with the targeted nation after the U.S. bans their importation) are highly intrusive in that they attempt to close off all export markets for producers in the targeted nation.

[21] Such unilateral sanctions are not always successful as evidenced in 1988 when certification of Japan under the Packwood-Magnuson Amendments — leading to a threat of 100 percent withholding of fishing allocations in U.S. territories — failed to elicit the desired response from the Japanese government (Martin and Brennan 1989). One author attributed U.S. hesitation to go ahead with sanctions and the lack of response from Japan to the fact that "Japan imported more U.S. fish products than the U.S. imported from Japan, and, therefore, Japan could threaten to retaliate." (McDorman 1991, 49) This demonstrates how unilateral U.S. trade measures used against poorer and smaller countries are both more attractive and more damaging.

[22] *Japan Whaling Association v. American Cetacean Society* (478 U.S. 221 1986) arose out of what environmental groups declared to be lenient treatment of a country whose nationals were diminishing the effectiveness of an international conservation agreement. According to the plaintiffs, certification should have been automatic under the Pelly Amendment. The Supreme Court, however, held that there was no obligatory requirement to certify; rather the executive branch can exercise some discretion (within reasonable bounds) in determining what kind of response will contribute most to the effectiveness of an international conservation program (Martin and Brennan 1991, 302-04).

[23] The United States government first moved to certify Norway (along with Japan) in 1983 for formally objecting to the moratorium. It has been suggested that, given Norway's dependence on U.S. imports, an American boycott of Norwegian fish products would have a catastrophic effect on Norway's economy. (D'Amato and Chopra 1991, 34).

[24] The tropical hawksbill sea turtle is protected under CITES. Via the CITES reservation clause, Japan has opted to excuse itself from the convention's requirements with respect to trade in hawksbill sea turtles (the hawksbill is just one of ten CITES protected species for which Japan has reserved its right to not be bound to the terms of the agreement). (*Audubon* 1991; *The Economist* 1991b, 34-5).

[25] Driesen 1991, 305 (citing Hyde, Comment, "Dolphin Conservation In the Tuna Industry: The United State Role in an International Problem," 16 *San Diego Law Review* 665, 692 (1979)).

[26] The power of U.S. unilateralism to shape policy in foreign countries is not limited to the environmental arena. We may also use the threat of trade measures to shape the human rights behavior of military or anti-democratic regimes. (Low and Sadafi 1991, 4; *The Journal of Commerce* 1992, 2A).

[27] The Ports and Waterways Safety Act, Sec. 201(7). (Driesen 1991, 304).

[28] For a discussion of the complicated process of multilateral negotiations, see Bilder 1981; Low and Sadafi 1991; Christensen and Geffin 1991-2.

[29] It also is inherently limited in that unilateral trade sanctions alone will not, at least prior to any subsequent multilateral agreement, efficiently and effectively reverse or mitigate an international ecological problem; concerted action will be needed in any effective solution. (Bilder, 1981, 85).

[30] For example, at the Rio preparatory meetings, U.S. reluctance to provide financial and technical aid was the main gripe of embittered delegates from the North and the South. (*The New York Times*, 1992).

[31] The MMPA includes measures to prevent countries whose dolphin fatality rates are higher than allowed for under the Act to indirectly export tuna to the U.S. market via intermediary nations. These include an import prohibition on fish and fish products from third countries that have not moved (within 60 days of a U.S. determination to cut off imports from a certain country for noncompliance with MMPA standards) to ban the importation of such products from the targeted nation. For statements of EC spokespeople condemning the MMPA, see *BNA International Environmental Daily*, 1992; Christensen and Geffin 1991-2, 30,32.

[32] Christensen and Geffin 1991-2, 45. On the other hand, free trade is only a means to an end—namely grater welfare. Obviously, income is just one component that feeds into welfare calculations; many people consider protection of the global environment a higher priority than free trade. The issue being debated, however, is not how important free trade is, but rather what the consequences (actual or potential) are of unilateral trade measures employed by the United States to influence environmental policy abroad.

[33] The multilateral fund devised during the 1990 London Amendments to the Montreal Protocol is exemplary. See generally, "Multilateral Fund of Montreal Protocol," 25 *Cornell International Law Journal* at 197-230 (1991).

[34] See *The Economist*, 1991a, 69.

[35] The same is true of the similar 1989 Amendments to the ESA targeting foreign nationals who harvest shrimp with processes that lead to an average incidental taking rate worse than those achieved by U.S. vessels.

[36] Bilder, for example, has argued that newly emerging international environmental norms as defined in UN resolutions or widely supported international agreements, for example, can be incorporated into international law (Bilder 1981, 69). McDorman also supports the notion that parties and even nonparties may be bound by the terms of an international agreement/treaty because it "codifies customary international law." (McDorman 1991, 500).

[37] World Bankers Low and Sadafi caution, however, that "[i]n general, the more remote international consensus is on an issue, the more disruptive will [the] use of trade policy [to encourage a commitment by a country to particular environmental policies or to an agreement] become." (Low and Sadafi 1991, 22).

[38] The Montreal Protocol on Substances that the Deplete the Ozone Layer is a good example of an international agreement that calls for the use of strict trade measures against non-parties as a way of promoting participation (GATT 1992, 38; GATT 1991b, 27-30).

[39] See GATT 1992, 30. While the Montreal Protocol employed negative incentives in the form of trade restrictions, its participation was also boosted by the very significant positive incentives in the agreement (e.g. the multilateral fund, technology transfer) and a scaled timetable recognizing both the unique needs of the less developed countries and the relatively minute contribution/blameworthiness of the South to the actual problem.

References

Anderson, Kym and Blackhurst, Richard. 1992. *The Greening of World Trade Issues*. Ann Arbor: The University of Michigan Press.

Bilder. 1981. The role of unilateral state action in preventing international environmental injury. *Vanderbilt Journal of Transnational Law*. 14: 51.

BNA International Environmental Daily. October 31, 1991. February 12, 1992.

BNA International Trade Reporter. 1991. Vol. 8 November 6.

Charnovitz, 1991. Exploring the Environmental Exceptions in GATT Article XX. *Journal of World Trade*. 25,5: 37.

Christensen and Geffin. 1991-92. *University of Miami Inter-American Law Review* 23: 569.

Convention on International Trade in Endangered Species, 1973. March 6. 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243.

D'Amato, Anthony and Sudhir K. Chopra. 1991. *American Journal of International Law* 85: 21.

de la Mare. 1990. Problems of scientific whaling. *Nature* 345: 771. June 28.

Driesen. 1991. The congressional role in international environmental law and its implications for statutory interpretation. *Boston College Environmental Affairs Law Review* 19: 287.

Driftnet Impact Monitoring, Assessment, and Control Act of 1987. 1988. 16 U.S.C. Sec. 1822.

The Economist. 1991a. A fishy story. May 4, 69.

The Economist. 1991b. Dolphins' day. November 30, 34.

Endangered Species Act. 1988. 16 U.S.C. Secs. 1531-1544.

Endangered Species Act. 1989 Amendments. 16 U.S.C.A. Sec. 1537(b)

Financial Times. 1992a. GATT members set to oppose U.S. on tuna import curb. February 19, 6.

Financial Times. 1992b. Pessimism grows for 'Earth Summit'. February 12.

Fisheries Conservation and Management Act. 1988. Packwood-Magnuson Amendments. 16 U.S.C. Sec. 1821 e2.

Fishermen's Protective Act of 1967. Pelly Amendment. 1988. 22 U.S.C. Sec. 1978.

General Agreement on Tariffs and Trade Document DS21/R. 1991a. United States — restrictions on imports of tuna. Sept. 3.

General Agreement on Tariffs and Trade Document L/6896 . 1991b. September 18.

General Agreement on Tariffs and Trade Report No. 1529. 1992. Trade and the environment. February 3.

The Hague Report 1992. Sustainable development: from concept to action. March.

Inter Press Service. 1992. January 24.

International Convention for the Regulation of Whaling. 1946. 61 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72. December 2.

International Pollution Deterrence Act of 1991. S. 894.

The Journal of Commerce. 1991a. Japan prepares to fight to retain driftnet fleet against U.S. opposition. November 5, 5A.

The Journal of Commerce. 1991b. Thailand rushes to pass legislation on wildlife traffic. July 16, 6A.

The Journal of Commerce. 1992. U.S. groups want to end preference for guatemala. May 14, 2A.

Lacey Act. 1988. 16 U.S.C. Secs. 3371-3378.

Low and Sadafi.1991. Trade policy and pollution. World Bank/International Trade Division. May, preliminary draft.

Magnuson Fisheries Management and Conservation Act, Driftnet Act Amendments of 1990. 1991. 16 U.S.C.A. Sec. 1826.

Marine Mammal Protection Act. 1988. 16 U.S.C. Secs. 1361-1407.

Marine Mammal Protection Act. 1991 Amendments, 16 U.S.C.A. Sec. 1371 a2E.

Martin and Brennan. 1989. Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments. *Denver Journal of International Law and Economics* 17: 293.

McDorman, 1991. The GATT consistency of U.S. fish import embargoes to stop driftnet fishing and save whales, dolphins and turtles. *George Washington Journal of International Law & Economics.* 24: 477.

Montreal Protocol on Substances That Deplete the Ozone Layer. 1987. 27 I.L.M. 1550. September 16.

New Scientist. 1990. Whaling nations threaten unilateral action. July 14, 22.

The New York Times. 1992. U.S. under fire in talks at U.N. on environment. March 24, A1.

Multilateral Fund of Montreal Protocol. 1991. *Cornell International Law Journal.* 25: 97.

T. Williams. 1991. Japan bashing reconsidered, *Audubon,* September/October 1991, 32.